Tennakoon D Harold v Public Prosecutor

HIGH COURT (JOHOR BAHRU) — CRIMINAL APPEAL NO 42-14-1996
ABDUL MALIK ISHAK J
15 JANUARY 1997

Criminal Procedure *— Appeal — Right of — Procedural ruling during trial — Defence objecting to marking of certain documents as exhibits — Whether ruling appealable — Criminal Procedure Code (FMS Cap 6) s 307(i)*

The appellant, a solicitor, was charged for criminal breach of trust under s 409 of the Penal Code (FMS Cap 45). During the trial at the sessions court, certain documents were sought by the prosecution to be marked as exhibits. The defence objected but the court finally admitted those documents by way of a procedural ruling. The defence filed an appeal against the decision of the trial court in allowing those documents to be marked as exhibits. The trial before the trial court came to a stop. The issue for consideration in this appeal was whether there was a right of appeal against a procedural ruling made by the trial court to the High Court.

Held, dismissing the appeal:

(1) A procedural ruling cannot be termed a judgment, sentence or order within the scope and ambit of s 307(i) of the Criminal Procedure Code (FMS Cap 6) ('the CPC') (see pp 500I–501F); *PP v Hoo Chang Chwen* [1962] MLJ 284, *PP v RK Menon & Anor* [1978] 2 MLJ 152, *Marzuki bin Mokhtar v PP* [1981] 2 MLJ 155 and *Maleb bin Su v PP and another appeal* [1984] 1 MLJ 311 followed.

(2) The term 'judgment' appearing in s 307(i) of the CPC must necessarily refer to a final order in a trial terminating in the conviction or an acquittal of the accused while an 'order' in s 307(i) of the CPC must relate to a final order (see p 503A); *Marzuki bin Mokhtar v PP* [1981] 2 MLJ 155 and *Maleb bin Su v PP and another appeal* [1984] 1 MLJ 311 followed; *PP v Raymond Chia Kim Chwee & Anor* [1985] 2 MLJ 436 distinguished.

(3) Procedural rulings are not appealable as they would open the floodgates and the administration of criminal justice would grind to a halt. Public confidence in the judiciary would therefore be eroded (see p 506H).

Obiter:

The revisionary powers of the High Court must be used sparingly and it could not extend to all cases. The object of revisionary powers of the High Court was to confer upon the High Court a kind of 'paternal or supervisory jurisdiction' in order to correct or prevent a miscarriage of justice. In a revision, the main question to be considered was whether substantial justice had been done and whether any order

made by the lower court should be interfered with in the interest of justice (see p 503B–D).

[Bahasa Malaysia summary

Perayu, seorang peguamcara, telah dituduh dengan kesalahan pecah amanah jenayah di bawah s 409 Kanun Keseksaan (NMB Bab 45). Semasa perbicaraan di mahkamah sesyen, pihak pendakwa telah meminta supaya dokumen tertentu ditanda sebagai ekshibit. Pihak pembelaan telah membantah tetapi mahkamah akhirnya menerima masuk dokumen tersebut melalui cara arahan prosedur. Pihak pembelaan telah memfailkan rayuan terhadap keputusan mahkamah perbicaraan dalam membenarkan dokumen tersebut ditanda sebagai ekshibit. Perbicaraan di mahkamah perbicaraan telah dihentikan. Isu untuk dipertimbangkan dalam rayuan ini adalah sama ada terdapat hak rayuan terhadap arahan prosedur yang dibuat oleh mahkamah perbicaraan kepada Mahkamah Tinggi.

Diputuskan, menolak rayuan:

(1) Arahan prosedur tidak boleh ditafsirkan sebagai satu penghakiman, hukuman ataupun perintah dalam skop dan lingkungan s 307(i) Kanun Acara Jenayah (NMB Bab 6) ('KAJ') (lihat ms 500I–501F); *PP v Hoo Chang Chwen* [1962] MLJ 284, *PP v RK Menon & Anor* [1978] 2 MLJ 152, *Marzuki bin Mokhtar v PP* [1981] 2 MLJ 155 dan *Maleb bin Su v PP and another appeal* [1984] 1 MLJ 311 diikut.

(2) Perkataan 'penghakiman' dalam s 307(i) KAJ seharusnya merujuk kepada satu perintah muktamad dalam perbicaraan yang berakhir dengan sabitan ataupun pembebasan tertuduh sedangkan satu 'perintah' dalam s 307(i) KAJ seharusnya merujuk kepada satu perintah muktamad (lihat ms 503A); *Marzuki bin Mokhtar v PP* [1981] 2 MLJ 155 dan *Maleb bin Su v PP and another appeal* [1984] 1 MLJ 311 diikut; *PP v Raymond Chia Kim Chwee & Anor* [1985] 2 MLJ 436 dibeza.

(3) Arahan prosedural tidak boleh dirayu kerana ianya akan membuka 'benteng' dan pentadbiran keadilan jenayah akan berhenti. Keyakinan orang awam dalam sistem kehakiman akan hilang (lihat ms 506H).

Obiter:

Kuasa penyemakan Mahkamah Tinggi hendaklah digunakan secara was-was dan tidak boleh dilanjutkan kepada semua kes. Objek kuasa penyemakan Mahkamah Tinggi adalah untuk menganugerahkan kepada Mahkamah Tinggi 'bidang kuasa penyeliaan dan paternalisme' supaya dapat membetulkan ataupun menghalang salah laksana keadilan. Dalam sesuatu penyemakan, persoalan utama untuk dipertimbangkan adalah sama ada keadilan telah dilakukan dan sama ada sebarang perintah yang dibuat oleh mahkamah rendah harus diganggu demi kepentingan keadilan (lihat ms 503B–D).]

Notes

For cases on the right of appeal on procedural rulings, see 5 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 414–418.

Cases referred to

Datuk Mahindar Singh v PP [1987] 2 CLJ 39 (refd)
Maleb bin Su v PP and another appeal [1984] 1 MLJ 311 (folld)
Marzuki bin Mokhtar v PP [1981] 2 MLJ 155 (folld)
Mohamed Anuardin bin Abdul Salam & Anor v PP [1996] 3 MLJ 298 (refd)
PP v Hoo Chang Chwen [1962] MLJ 284 (folld)
PP v Kulasingam [1974] 2 MLJ 26 (refd)
PP v RK Menon & Anor [1978] 2 MLJ 152 (folld)
PP v Raymond Chia Kim Chwee & Anor [1985] 2 MLJ 436 (distd)
PP v Sandra Margaret Birch [1977] 1 MLJ 129 (refd)

Legislation referred to

Courts of Judicature Act 1964 s 35
Criminal Procedure Code (FMS Cap 6) ss 51, 113, 261, 305, 306, 307(i)
Evidence Act 1950 s 27
Penal Code (FMS Cap 45) ss 193, 409

RK Nathan (*S Theivanthiran* with him) (*Nathan & Yang*) for the appellant.

Amelia Tee bte Abdullah (Senior Deputy Public Prosecutor) for the Public Prosecutor.

Abdul Malik Ishak J: The appellant, a solicitor, was charged for criminal breach of trust under s 409 of the Penal Code (FMS Cap 45) ('the PC') before the Sessions Court Johor Bahru ('the trial court'). In the midst of the trial while Mohamed Amiruddin bin Ajmain (PW3) was on the stand giving evidence for the prosecution, certain documents were sought, by the prosecution to be marked as exhs P5ABC, P34ABC, P35ABC and P36ABC. The defence objected and there were lengthy submissions advanced by both the defence and the prosecution. The trial court finally admitted those documents by way of a procedural ruling. The defence quickly filed an appeal against the decision of the trial court in allowing those documents to be marked as exhibits. The whole trial before the trial court came to an abrupt stop. The administration of criminal justice was halted by this untimely appeal.

There is only one crucial issue in this appeal and that is whether there is a right of appeal against a procedural ruling made by the trial court to the High Court. For this purpose, I shall examine some authorities which are germane and applicable to the issue at hand.

For a start would be the case of *PP v Hoo Chang Chwen* [1962] MLJ 284, where it was held that where there was a contest as to a certain procedural ruling made by the magistrate, the prosecution or the defence cannot appeal in the middle of the trial against that procedural ruling

because such a ruling was not an appealable order within the provisions of the Criminal Procedure Code (FMS Cap 6)('the CPC'). Rose CJ, who sat in the High Court, gave a good reason for refusing to hear the appeal. This was what his Lordship said:

> I would add that to arrive at any other conclusion would seem to me to open the door to a number of appeals in the course of criminal trials on points which are in their essence procedural. The proper time, of course, to take such points would be upon appeal, after determination of the principal matter in the trial court.

This would be followed by the following cases. In *PP v RK Menon & Anor* [1978] 2 MLJ 152, the High Court there vigorously applied the case of *PP v Hoo Chang Chwen* and held that there was no right of appeal against a procedural ruling made by a subordinate court in the course of and during the hearing of a criminal trial. A procedural ruling was held not to be a judgment, sentence or order within the meaning of s 307(i) of the CPC. This was what Ajaib Singh J said at p 152:

> The legislature has for good reason refrained from making any provision for an appeal to be preferred against a procedural ruling made in the subordinate court in a criminal case or matter. In the course of criminal trials in the subordinate courts, the presiding officers quite often make rulings on questions which are purely procedural in nature. If an appeal is allowed to be preferred by the prosecution or the defence against a procedural ruling, further hearing of the particular criminal trial in the subordinate court will necessarily have to be stayed pending the outcome of the appeal in the High Court. Imagine the number of such appeals which are bound to be preferred against scores of procedural rulings which are a daily occurrence in criminal trials in the subordinate courts in the country. The result would be that the whole administration of criminal justice would be bogged down.

Tan Chiaw Thong J in *Marzuki bin Mokhtar v PP* [1981] 2 MLJ 155 was of the view that a ruling made at the end of the case for the prosecution in a criminal trial that there was a case for the accused to answer on the charges against him was not a judgment within the contemplation of s 307(i) of the CPC. His Lordship was further of the view that the word 'judgment' in criminal proceedings must mean the final order in a trial terminating in the conviction or acquittal of the accused. Since the appeal had been brought prematurely, his Lordship felt that it was not competent for the court to deal with the appeal on its merits.

Hashim Yeop Sani FJ (as he then was), sitting in the High Court, had occasion to consider the meaning to be attached to s 307(i) of the CPC in the case of *Maleb bin Su v PP and another appeal* [1984] 1 MLJ 311. In a well-reasoned judgment, his Lordship had this to say at p 312:

> First, the question of the right to appeal. Under s 307(i) of the CPC, any person dissatisfied with any judgment, sentence or order pronounced by the magistrate in a criminal case may appeal to the High Court against any such judgment, sentence or order. There is no argument, in my opinion, that the *ejusdem generis* rule applies to the word 'order' which is preceded by the words 'judgment' and 'sentence'. The order must therefore be a final order in the sense that it is final in effect as in the case of a judgment or a sentence.

> The test for determining the finality of an order is to see whether the judgment or order finally disposes of the rights of the parties (see the discussion of this point in *Mohammad Amin Bros v The Dominion of India* AIR 1937 1950 FC 77). The order which finally disposes of the rights of the parties should be distinguished from a purely procedural ruling. See also *PP v Hoo Chang Chwen* [1962] MLJ 284 and *PP v RK Menon & Anor* [1978] 2 MLJ 152. In the former case, Rose CJ of Singapore dealt with an appeal on the admissibility of certain statements and the learned judge held that the ruling of the magistrate was a procedural ruling and therefore not an appealable order. In the latter case, Ajaib J also correctly took the view that a ruling on non-compliance with s 129(i)(b) of the CPC was a procedural and non-appealable ruling.
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> In the present appeal, the dismissal of the application to *disqualify did not finally dispose of the rights of the accused persons and the order is in my opinion certainly not a proper matter for appeal under s 307(i) of the CPC.* (Emphasis added.)

Now, while Rose CJ *in PP v Hoo Chang Chwen* did not say anything about his revisionary powers to dispose of the appeal on its merits, Ajaib Singh J in *PP v RK Menon & Anor* was invited to do so but his Lordship was inclined not to and he let the case take its normal course in the lower court. Tan Chiaw Thong J in *Marzuki bin Mokhtar v PP* was not inclined to deal with the merits of the appeal. However, Hashim Yeop Sani FJ in *Maleb bin Su v PP and another appeal* [1984] 1 MLJ 311 felt inclined to exercise his revisionary powers in order to clear 'the cloud of uncertainty among judicial officers' with regard to the crucial question of whether the Attorney General was the head of the judicial department. On this point, his Lordship had this to say at p 312:

> However, notwithstanding the absence of the right to appeal it would be desirable in my opinion to exercise my revisionary powers to dispose of the issue in these appeals on the merit since the questions involved have created some degree of uncertainty among judicial officers.

Recently, in *Mohamed Anuardin bin Abdul Salam & Anor v PP* [1996] 3 MLJ 298, Kang Hwee Gee J ruled that the sessions court judge's exercise of his discretionary power under s 261 of the CPC in ordering that the case against the appellants, which was partly heard by the previous sessions court judge, be continued by him from the point where it had been left off and not de novo was purely procedural and not appealable. His Lordship was further of the view that such an exercise of discretion, even if wrongful, could still be raised at the appeal of the case proper.

An attempt was made to convince me that I should exercise my revisionary powers to peruse the evidence and rule in favour of the present appellant. Reference was made to the case of *PP v Sandra Margaret Birch* [1977] 1 MLJ 129 where Arulanandom J, upon reading a report in the *News Straits Times* of Thursday, 19 August 1976 exercised his reversionary powers under s 35 of the Courts of Judicature Act 1964 and called for the records of the case by reversing the lower court's decision. *Sandra Margaret Birch*'s case can readily be distinguished from the facts of the present case. There, the learned president of the sessions court wrongly held the view

that any statement or information given must fulfil the requirements of s 113 of the CPC, thereby rendering s 27 of the Evidence Act 1950 nugatory and no longer in force. Arulanandom J quite rightly called for the records and reversed the decision by holding that all statements which fall within the province of s 27 of the Evidence Act 1950 were admissible in the court of law and that such admissions were not repugnant to the amended s 113 of the CPC. If I were in the shoes of Arulanandom J, I would do likewise. In sharp contrast, the present appeal revolves entirely on a procedural ruling by the trial court in regard to the marking of certain documentary exhibits. It is an everyday affair in our courts for documents to be marked as exhibits in the course of a trial. A daily occurrence of this nature, even if wrongfully done, could still be raised at the appeal proper.

In *Datuk Mahindar Singh v PP* [1987] 2 CLJ 39, KC Vohrah J was of the view that though there was no right of appeal, his Lordship was prepared to revise the case as the objection was on a point of law, namely that complaints under s 193 of the PC were made without the written sanction of either the public prosecutor or a deputy public prosecutor.

In *PP v Raymond Chia Kim Chwee & Anor* [1985] 2 MLJ 436 the (then) Supreme Court had to decide on a reference, one of which was whether an appeal lay to the High Court from an order made by a subordinate court ordering the prosecution to supply photocopies of documents to the defence before the trial under s 51 of the CPC. Hashim Yeop Sani SCJ, delivering the judgment of the court had this to say at p 438:

> The right of a person to ask for a document or other material in a criminal proceeding under s 51 is a right exercisable at the discretion of the court. Thus a decision or order to issue a summons under s 51 of the CPC is a final order in the sense that it is final in its effect and therefore appealable under s 307(i) of the CPC.

On the facts, *Raymond Chia*'s case can readily be distinguished from the present appeal. Here, there was no finality of the order of the trial court and that order did not dispose of the rights of the parties.

Several observations, more in the form of a summary, can be framed on the basis of the authorities cited above. These can conveniently be compartmentalized in the following terms:

(1) Procedural rulings are not appealable and these rulings are a daily occurrence in criminal trials before the subordinate courts throughout the country;

(2) If procedural rulings are appealable, it would open the floodgates and the administration of criminal justice would grind to a halt. Public confidence in the judiciary would be eroded;

(3) The right time to advance an argument against any particular procedural ruling would be at the time of the substantive appeal;

(4) Reading s 307(i) of the CPC in its right perspective would bar the appellate court from going into the merits of an appeal where that appeal mainly pivoted on a procedural ruling;

(5) The word 'judgment' appearing in s 307(i) of the CPC must necessarily refer to a final order in a trial terminating in the conviction or an acquittal of the accused;

(6) The word 'order' as employed in s 307(i) of the CPC must relate to a final order. The test to determine the finality of an order would be to see whether the judgment or order 'finally disposes of the rights of the parties';

(7) The revisionary powers of the High Court must be used sparingly and it cannot extend to all cases. As Hashim Yeop Sani J (as he then was) said in the case of *PP v Kulasingam* [1974] 2 MLJ 26 at p 26:

> The object of revisionary powers of the High Court is to confer upon the High Court a kind of 'paternal or supervisory jurisdiction' in order to correct or prevent a miscarriage of justice. In a revision, the main question to be considered is whether substantial justice has been done or will be done and whether any order made by the lower court should be interfered with in the interest of justice.

(8) A procedural ruling cannot be termed a judgment, sentence or order within the scope and ambit of s 307(i) of the CPC.

Of course, it goes without saying that no appeal shall lie from a judgment, sentence or order of a magistrate where the offence is punishable with a fine only, not exceeding RM25 (s 304 of the CPC). Then again, when an accused person has pleaded guilty and been convicted by a magistrate on such plea, there shall be no appeal except as to the extent or legality of the sentence (s 305 of the CPC). Of pertinence too would be the position where an accused person has been acquitted by a magistrate. In such a case, there shall be no appeal except by, or with the sanction in writing of, the public prosecutor (s 306 of the CPC). These are the basics which every criminal lawyer should know.

It was argued that those documentary exhibits go into the very rubric of the charge which the appellant was facing and consequently, the appeal should be heard on its merits. The learned deputy public prosecutor, Amelia Tee bte Abdullah strenuously argued that the appeal, being procedural in nature, should not be entertained and should be dismissed forthwith. I entirely agree with her. I am not inclined to exercise my revisionary powers at this juncture.

For the reasons adumbrated above, I dismissed the appeal and made a consequential order to the effect that the same sessions court judge should proceed with the trial from the point where she had adjourned. The trial should proceed expeditiously without any more delay.

Appeal dismissed.

Reported by Kenneth Goh